UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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IN RE:	)	
	)	
NATIONAL PRESCRIPTION	)	CASE NO. 1:17CV2804
	)	
OPIATE LITIGATION	)	

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TRANSCRIPT OF TELECONFERENCE PROCEEDINGS HAD BEFORE THE HONORABLE JUDGE DAN A. POLSTER, JUDGE OF SAID COURT, ON MONDAY, SEPTEMBER 16TH, 2019, COMMENCING AT 2:30 O'CLOCK P.M.

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P R O C E E D I N G S

THE COURT: Good afternoon, everyone.

I guess I want to — and we have a court reporter here. I think J & J suggested it. I think it is a good idea, so this will be transcribed. This is obviously the Opiate MDL 2804.

This is a discussion with counsel for the two Plaintiffs in the October trial and the eight Defendants we currently have.

Obviously, there is, at least one of these Defendants, a settlement has been announced. It may very well go through. There may be other settlements, but at the moment, we have eight, and I wanted to discuss a few things.

The trial documents are due September 25th. That's a week from Wednesday. The main thing I am looking for are relatively short trial briefs. I don't need a regurgitation of all the law and everything you had in those summary judgment motions.

I am really doing it to see — get a sense from each side how you are going to prove your case and how you are going to defend your case so I can follow what's going on. So I don't want more than ten pages.

The jury instructions, they are to be agreed

upon, and only if there are disagreements, then, you can highlight where you disagree. But I mean, RICO is established; Ohio RICO is established; same with conspiracy, public nusance, the law should be clear.

Motions in limine are also due. I don't want hundreds of them. All right. I want -- if there are a few important things that you think the Court should decide before trial that will streamline things, fine, but if I get a hundred motions in limine, I am just going to toss them all. I won't even read them, and my staff won't read them, so be circumspect about what you are doing. They should be short and succinct.

Someone asked a question about the length of time for opening statements. I guess I am looking to you for suggestions. I mean, opening statements are not closing arguments. They are a road map for your evidence. There are, you know, eight Defendants.

I don't want people repeating the same thing. Okay? So why don't you all -- you can figure that out and give me some suggestions. If I have to set elements, I will, but I would rather hear what you say and suggest. You have got some of the best trial lawyers in the country.

And good lawyers know what to say, and that

— unless you are the most spellbinding orator on the planet, you much past 45 minutes, people are going to go to sleep. So I don't think they should be longer than that, and I really think 30 — I really think 30 minutes, particularly since the Defendants shouldn't be repeating what each of you are saying.

So if you focus on, sort of discuss with each other, you only need one person to make general points. You don't need all eight.

The main thing I wanted to discuss is public nusance. And my objective from the start was to do everything I could to make the trial fair for all the parties.

And the prerequisite for that, a fair trial is that it be manageable and intelligible to a jury, and defense counsel pointed out multiple times that a trial of 22 Defendants with myriad claims was unworkable, unmanageable. I agreed.

I made it clear to the Plaintiffs that they had to streamline it. And that has happened. We are down from 22 Defendants to eight through severance, bankruptcy, settlements. It wouldn't surprise me if by the time we reach October 21 we will have fewer than eight, but eight is manageable.

I requested submissions the last week or two

on how to handle the public nusance claims, and I want to complement everyone. They were short; they were well written; they were right to the point, and they helped me crystallize my thinking.

There was never a question that we were going to have a jury to decide federal and state RICO and conspiracy, and if they find liability on any of those claims, what damages? There was never any question about that. The issue was what to do about public nusance.

This was highlighted in the submissions, but I want to make sure I am correct about this. It appears that there will be a very, very substantial overlap in the evidence that the Plaintiffs are going to introduce, the lay testimony, the expert testimony, the documents on the federal RICO, the state RICO, conspiracy and the public nusance.

Is that correct from the Plaintiffs' side?

MR. WEINBERGER: Your Honor, this is Pete Weinberger, there is overlap. We agree.

THE COURT: All right. And I think substantial overlap. I don't think we are talking about two — you know, there is substantial overlap.

And second, I think everyone agreed that in

the event there is liability for public nusance, the question of abatement, monetary, non monetary abatement, remedy for public nusance is equitable. It is for the Court to decide and not a jury.

Is there any party that disagrees with that?

MR. PISTILLI: Your Honor, this is Chris Pistilli for McKesson.

I had indicated in our submission, it is our understanding that true abatement relief is appropriate for the jury. As we've indicated in prior submissions, it is not Defendants' position that the relief Plaintiffs are seeking, which is essentially monetary damages in its abatement, but we understand your Honor has already ruled on it.

THE COURT: Well, there can be economic and non economic abatement. Abatement is abatement. It is not damages for anything in the past.

If prospective relief to abate a nuisance costs something, well, it costs something. It is directing that things be done, and usually, things cost something to do.

So it is --

MR. PISTILLI: We understand your Honor's ruling on that.

THE COURT: Well, I think I've ruled.

In other words, it is not for -- all right.

It seems to me what I am proposing is that a jury decide whether or not any of the Defendants are liable for public nusance. And that's all the jury will decide with respect to public nusance. There is not going to be any evidence or testimony about what any relief or abatement would be in the event there is nuisance, how much it would cost, who would do what, whatever.

We are not going to take the time in the trial for that because the jury isn't going to decide it, and my concern is, it may confuse them, and they may jumble things up and conflate that with past damages.

And that's for me to decide if and only if the jury determines that anyone has committed a public nusance. And again, I think the Defendants made a good argument that they are entitled to a jury determination on the facts, which support a public nusance claim, an up or down, and it seems to me in that case the jury should decide the liability as well. It avoids any possible inconsistency between what I do and what the jury does.

If the jury is finding the facts, the jury can -- you know, the instructions will tell them what the elements are, and they will decide. And so we will have

a jury trial on the state and federal RICO and conspiracy and public nusance liability only.

And then, at the end of the trial, if there is — if and only if there is a verdict on public nusance against one or more of the Defendants, I will discuss that with the parties, and we will schedule an evidentiary proceeding at some point post trial, and I will determine what the appropriate remedy is, and then, of course, either side can appeal from that.

So I am putting that out there, and I want to know if anyone has a real problem now, if they want to — you know, this is discussion. I synthesized this from what I read, and it seems to me it has the merits of either — it either shortens the trial or keeps the trial the same length and let's both sides spend more hours on the claims you've got, and you don't have to take it up on putting in a whole lot of evidence about what abatement would look like.

So that's a plus. It avoids — the jury is just going to be confused. You know, I can instruct them that's for me, not for them, but that's hard to follow, and they are going to wonder why they are spending their time on that.

And three, it eliminates the possibility that somehow that testimony about the future is going to

— and how much abating that will be will somehow leak in or influence their decision on anything else.

So I think from where I sit it makes sense on all three grounds. So does anyone have any thoughts or reaction to that?

MR. PETROCELLI: Your Honor, Dan Petrocelli. I represent Johnson & Johnson & Jansen.

We certainly agree with the Court that the matter of abatement and all the evidence with respect to that is not for the jury but for the Court in some post-trial proceeding if and when liability already were established.

However, as we indicated in our submission, we also believe that the fact of public nusance is also for the Court.

THE COURT: I know that, Dan, but you were in the minority. Okay? I think all the other Defendants said, at least, the facts are for the jury. And so I'm concerned about somehow inconsistent verdicts because if there is a substantial overlap in the testimony and the jury is deciding the facts and all the other claims that are clearly legal and then I am sitting there hearing the same testimony and deciding whether or not there is a public nusance, I think that's a problem.

So I think it is better if — I think it is

better for the jury to decide it. If someone — I mean, I understand, Dan, I read your brief. I saw that position, but I think if you are suggesting that somehow I sit there and I hear the same evidence and regardless of what the jury does on state and federal RICO and conspiracy I come to my own conclusion on public nusance, you haven't explained why that isn't a problem.

MR. PETROCELLI: Well, I think it is fundamentally an equitable claim, and it is not for the jury to decide, and I do believe that it will entail taking additional evidence of beyond the three legal claims.

And I fear that —

THE COURT: What is that significant evidence? I didn't hear that from the Plaintiffs. On the remedy, absolutely.

MR. PETROCELLI: And your Honor, I am afraid that if the public nusance is in front of the jury, there is going to be leakage of abatement-type matters into the record in front of the jury, which will prejudice the Defendants.

THE COURT: Well, there isn't going to be any testimony about abatement. That's what I am saying.

The parties aren't going to introduce it, and I will give an instruction similar to the one I give

in criminal cases that says, if you find the Defendant is guilty, the punishment is up to me, and you are not even to guess or speculate or even consider what that will be, so I will do the same thing.

They are just to find whether or not the Plaintiff has made out and met every element of the claim of public nusance, and they will have to vote on each of the eight Defendants separately and yes or no.

And I will have an instruction that it will be strictly up to the Court to decide what to do about it if you find there is public nusance liability, and that's that. And there won't be any testimony about injunctive relief, abatement measures, anything about that at all, zero. I won't even let anyone talk about it, you know, what they might do or should do.

MR. PETROCELLI: Or how much they are seeking.

THE COURT: Or how much they are seeking.

And right, they can talk about how much they are seeking for past damages, damages on the conspiracy and the RICO. That's different. They can say the past eight years we have spent whatever. There is going to be testimony about that.

But I am not going to allow anyone to even talk about what they might be seeking or wishing for the

future in opening statement or anything, zero. You can use your time on the seven weeks we have on the rest of the case.

So that's my —

MR. WEINBERGER: Your Honor, this is Pete —

THE COURT: Yes.

MR. WEINBERGER: — Weinberger. Can I just interrupt you for a second?

THE COURT: Yeah, you weren't interrupting. I asked everyone.

MR. WEINBERGER: I just want to verify —

THE COURT: Yes.

MR. WEINBERGER: — I want to be clear that under the RICO claims and the civil conspiracy claims we also have claims for future damages, not associated with abatement, but to the extent the damages continue into the future, we do have evidence of that, and that is relevant to those claims.

So I didn't — I want to make sure we are clear on the record with respect to that.

THE COURT: Well, how can you seek damages for the future?

MR. WEINBERGER: Well, to the extent that the damages that we have suffered, that we are proving are past damages, to the extent that they continue into

the future and can be calculated with reasonable certainty, we are entitled to present those to the jury under those causes of action.

THE COURT: Well —

MR. PETROCELLI: Your Honor, this is Mr. Petrocelli. This is precisely the issue that I was alluding to because this is an argument for getting everything in front of the jury contrary to everything you just got finished saying.

THE COURT: Well, I don't think — I mean — all right.

In a personal injury case, if you have someone who is injured and you are getting past — compensation for past injury, that could include, if you can quantify it, things that will have to be done in the future.

For example, a life-care plan, if you have someone who has been injured, has catastrophic injuries and needs care for — say their life expectancies is ten years, they are going to need care for ten years — and you can quantify it through fact witnesses, experts, whatever, and say "hey, it is going to cost a hundred thousand dollars a year for the next 20 years to care for this person," a jury can find that.

Whether or not you have got that kind of

proof or whether it is speculative, you know, I don't know. But again, that's not abatement; that's — you know, again, I will wait and see what that testimony is. That's not equitable, and that's not abatement.

It has got to be specifically tied to past harm, and I am not sure exactly, Pete, exactly what you are seeking. And you know, you will have to spell that out, and I will have to look at the law, but that's not — that's not public nusance; that's — so if you can prove that and the law permits it, you may be able to get it, and a jury could consider it.

You better put that in your trial briefs because I am going to have to decide that, and if I — I will look at that very carefully. That hasn't really been fronted in all the issues that I've had to decide. So you better put that in the trial briefs.

MR. REED: Your Honor —

THE COURT: Yes.

MR. REED: — I apologize. I apologize for interrupting. Steve Reed for Teva.

Just to be clear, Teva agrees with the approach, your Honor, that you've outlined. We don't agree that the Plaintiffs are entitled to future damages. We will likely have a dispute or a debate, at least, over what types of remedies they are entitled to under their

public nusance claim, but that's something that we can take up if and when it is necessary.

THE COURT: Well, that's the whole point.

MR. REED: Right. Exactly. I am agreeing with you, your Honor.

I think you've outlined the most efficient, sensible approach.

THE COURT: All right.

MR. REED: We are anxious to use the trial time efficiently.

THE COURT: I need to understand from the Plaintiffs exactly what you are talking about with these future damages because I am not certain — I am not certain that you can get them, but I will look, and so you better get that to me as quickly as possible, and the Defendants can respond.

If they think the Plaintiffs are not entitled to seek — remember, we don't have individuals, specific individuals in this case; we have got Government entities.

And I, quite frankly, thought that what you are seeking in those legal claims are past damages, money that the cities, counties, states had spent above and beyond what they otherwise would have spent in law enforcement, public health treatment, all that, that they

are laying out, that they wouldn't have otherwise laid out or lost opportunity to use that money for something else. I didn't think you were going to —

MR. WEINBERGER: Understood, your Honor.

THE COURT: — that you were going to try and have the jury guess how much you are going to have to pay in the future. I am not at all sure you can do that.

MR. WEINBERGER: We'll — we will present that in our trial brief.

There is one other issue that I wanted to address, and again, this is Pete Weinberger. With respect to the public nusance claim, one of the elements is whether the public nusance is abatable, which will require testimony if we are going to try that phase. Before we get to what the abatement remedy is, it will require testimony about how we would address that element of the abatement through expert testimony. So —

THE COURT: I don't want any of that stuff. I mean, whether it is abatable is up to me to decide. It seems to me that's part of the equitable remedy if and only if the jury decides any of the Defendants have created a public nusance.

If they've created it, the remedy is up to

me. If I determine that it can't be abated, well, then there is no remedy. All right. If I determine there is nothing — that there is nothing anyone can do to make it better or fix it, well, then, that's the end of it, but it seems to me that's for me to decide, not the jury.

They decide the elements of what public nusance is and whether the Plaintiff has proven all those elements with respect to any of the eight Defendants. I mean, am I wrong about that? I don't see how an element of public nusance is whether or not it is abatable, the nuisance is causing —

MR. REED: We agree with your Honor.

THE COURT: All right. So we are not going to have any testimony about whether a public nusance is or isn't abatable or how to abate it. We will put that off, and if there is liability, I will schedule it with the parties.

MR. SKOLNIK: Judge Polster, this is Hunter Skolnik. I am sorry to interrupt; just a quick point: So would this contemplate a post — some type of post jury verdict proceeding —

THE COURT: Yeah.

MR. SKOLNIK: On the —

THE COURT: That I would do.

MR. SKOLNIK: — abatement plan?

THE COURT: Yes, Hunter.

MR. SKOLNIK: And that would include your assessment if it is abatable? I'm sorry.

THE COURT: If and only if the jury finds public nusance liability on at least one Defendant, then I will have a post-trial proceeding. Whether you call it a bench trial, an evidentiary hearing, I don't think it matters, it is the same thing.

And I will hear testimony from both sides as to, A, whether or not it can be abated, and B, if so, how to do so. And I will make a decision, and obviously, it will be written, and either side or both sides can appeal from it.

And when I schedule it, I will figure it out with the parties. I mean, it is not going to be the next day obviously. It seems to me that's the most efficient way to do it.

MR. SKOLNIK: Understood. Thank you.

THE COURT: Obviously, if the Plaintiffs don't prove public nusance, we never have it. Which is another reason to put it off. All right.

Well, I think that's what we are -- unless someone -- I mean, if someone feels very strongly that they will be -- that they will be prejudiced by this or that this somehow -- I mean, if I am violating

established Sixth Circuit law or Supreme Court law by doing this, I want to know.

I don't want to go hell-bended to a reversible error, but — so if someone thinks there is established Sixth Circuit or Supreme Court law to the contrary, I certainly want to know about it, and I will have to look very carefully because that's not my intention.

Or if someone thinks that they will be very seriously prejudiced by this approach, I want to know that because I am certainly not looking to do that. I am trying to do the opposite, in fact, to be very fair to both sides. So I would like to know that.

And then, very quickly, like I would say no later than Thursday at noon, if someone thinks I have got — I mean, there is Sixth Circuit or Supreme Court law that I am ignoring or that they will be seriously prejudiced, file something by noon on Thursday. And then, I am trying to think, the best way to address this question of future damages, so — well, Judge Ruiz is suggesting to do it in the motion in limine.

MS. HUGHES: If not sooner.

THE COURT: Well, I am trying to think.

If we do it that way, yeah, why don't we do that? Why don't we do it this way?

Since it has sort of been teed up, each side — I mean, Plaintiffs can file one motion in limine if you think you are entitled to future damages on the state or federal RICO or conspiracy and set out the evidentiary and legal basis for it.

And if the Defendants feel that the Plaintiffs aren't entitled, you file, and then you can each respond to each other's. So I get the full picture according to the schedule we have. And again, I don't need eight briefs from the Defendants. Okay.

If you all have a similar position, I would appreciate one. And if you need a little longer, if you are all eight joining in it, that's okay, but we don't need eight things saying the same thing. I assume probably all eight are going to agree on it, so we will just get one, and I will take a look at it, and that's obviously something I will need to decide before trial because it affects a lot.

MR. REED: Your Honor, Steve Reed again for Teva.

THE COURT: Yeah.

MR. REED: There are two issues if I may. One is on the motion in limine, it is my understanding that we have aggregate page limits and set for motions in limine. I am concerned that this new round today

will lead into what is already a limited allocation.

May we have your permission to —

THE COURT: Yeah.

MR. REED: — we will keep these short but whatever pages —

THE COURT: Since I decided to add one, what do we have, and I can add.

MS. HUGHES: We have I believe —

VOICE: I believe it was 40 pages or so in the aggregate, something like that. I am sure the parties know.

THE COURT: Does anyone know what the aggregate page limit for motions in limine are?

MS. LUCAS: Your Honor, this is Amy Lucas for Jansen. It is 44 pages for aggregate each side; 22 pages for the aggregate, distributor, manufacturer, pharmacy brief, and eight pages per party for individual issues.

THE COURT: It might be more than 44, but I didn't quite understand that. 44 in the aggregate?

MS. LUCAS: We understand that each Plaintiff and the Defendant each file one joint defense or joint Plaintiff motion. That's 44 pages. Then, the manufacturing group can file a manufacturers' specific motion as 22 pages, and then each individual — Jansen

then has eight pages to brief our individual issues.

VOICE: There has been some discussion.

MS. LUCAS: Right. There has been some discussion about moving pages around Special Master Cohen, but that's —

THE COURT: I am not aware of any of this. I haven't seen it, so I don't know. That seems to be a whole lot of pages, a lot more than I want or need already. That looks like a hundred pages or more per side. I mean, I think that's crazy.

So I am certainly not going to add to that. I thought it was something a lot smaller, like maybe 40 pages total. That certainly seems ample to me to what we are talking about. So I am certainly not going to add to that. That seems — I got to take a look at that. That seems way too long.

MR. PETROCELLI: Your Honor, Mr. Petrocelli here.

While you are thinking about that —

THE COURT: I am not thinking; I am just saying I thought about it. It is way too long.

MR. PETROCELLI: Okay. Well, apparently, they are reading from some kind of order that was previously issued.

THE COURT: If it has been issued, I am

stuck with it.

MS. LUCAS: 24 pages.

THE COURT: Well —

MR. PETROCELLI: Amy, do you have a correction?

MS. LUCAS: It is 24 pages for the industry group. If you want to look at the order, your Honor, docket entry 1709 and —

THE COURT: All right. Well, it seems —

MR. PETROCELLI: Your Honor, but my question, in addition to this page issue, is this additional motion in limine that you are allowing each side to file, is that due on the same day, which I think is the 25th of September?

THE COURT: Right. That should be the same day so I can address this stuff before trial. That's the whole idea, and this is an important one because I have got to — you know, this affects some substantial testimony possibly.

MR. PETROCELLI: Thank you, your Honor.

THE COURT: Okay. In fact, that covers what I had to cover, and again, I appreciate everyone's hard work. My job is to make this trial, do whatever I can to make it intelligible to a group of people that we select as jurors. So that's what I am trying to do. Okay?

Thank you, all.

MR. PETROCELLI: Your Honor, Mr. Petrocelli again.

THE COURT: Well, all right. Some people may have gotten off, but go ahead.

MR. PETROCELLI: Yeah. About the prescreening process, we come to learn that juror summons have gone out.

THE COURT: Right.

MR. PETROCELLI: And they apparently include a question about whether the jurors are available for a trial of approximately 8 weeks.

THE COURT: Right.

MR. PETROCELLI: And I want to get more clarity on how that process is being conducted.

In other words, what's the question —

THE COURT: I don't know exactly. I stay out of that. The jurors know — I mean, there is no point bringing people in who say "I can't" — you know, "I can only stay two or three weeks," Mr. Petrocelli.

MR. PETROCELLI: Well, your Honor, though, a lot of people say that when they are just trying to get out of jury duty.

THE COURT: Well, I can't do anything about

that. I want people who understand that this is a lengthy commitment, and if they have personal or professional obligations that include that, we are not counting them, and I want to start with people who, at least, can do that.

MS. HUGHES: And I assume that the jury department is —

THE COURT: The jury department knows how to do that.

MS. HUGHES: Right.

THE COURT: And they do it when we have long trials, and I don't get into that. So if someone wants to call the jury department that he can find out, but I am not getting involved in that. Our jury department are professionals, and they know how to do these things.

MR. PETROCELLI: Thank you, your Honor.

THE COURT: So I just thought it was not efficient to bring in a bunch of people, and we lose them all because they say "well, I have got to do this and that in November, and I am out of here."

It is going to be difficult enough, then, focusing on people who can be fair and impartial. So we are going to start. The only people we are going to bring in are people who have said that they are able to serve on a long trial.

MS. HUGHES: And are, in fact, able.

THE COURT: Well, I assume they wouldn't say they are able if they are not. So if they are able and willing to do it.

Okay. Thank you, all.

(Teleconference concluded at 3:11 p.m.)

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C E R T I F I C A T E

I, George J. Staiduhar, Official Court Reporter in and for the United States District Court, for the Northern District of Ohio, Eastern Division, do hereby certify that the foregoing is a true and correct transcript of the proceedings herein.

s/George J. Staiduhar
George J. Staiduhar,
Official Court Reporter

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